

Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC.

Defendant.

Case No. 2:23-cv-0932-JHC

DECLARATION OF ADAM ROTTNER

(Pursuant to 28 U.S.C. § 1746)

I, Adam Rottner, hereby state that I have personal knowledge of the facts set forth below.
If called as a witness, I could and would testify as follows:

1. I am a United States citizen and am over eighteen years of age. I am employed by the Federal Trade Commission ("FTC" or the "Commission") as a Senior Investigator in the Division of Enforcement, Bureau of Consumer Protection. My office address is 600 Pennsylvania Avenue, NW, Washington, DC 20580.
2. Consistent with Local Rule 10(e)(10), highlighting has been added to the attachments to indicate excerpts referenced in this declaration or the accompanying motion.

CLAWED BACK DOCUMENTS

3. On August 2, 2023, I reviewed the transcript of the October 21, 2022 investigational hearing of Neil Lindsay. During that hearing, Mr. Lindsay's counsel (who also represented Amazon) never requested that the FTC return, destroy, or sequester Lindsay

1 Exhibits 9 and 10. Instead, counsel said “we have some concerns about privilege issues
2 regarding Exhibits 9 and 10. They’re just going to take a little time for us to kind of track
3 down and get to the bottom of.” Dkt. #51-5 at 7-8.

4 4. I also reviewed the January 13, 2023 letter from Laura Kim to Jonathan Cohen. Dkt #4-1
5 at 74-75. That letter does not refer to Lindsay Exhibits 9 and 10.

6 5. I then reviewed all correspondence between Amazon and the FTC relating to clawed
7 back documents and confirmed that there was no request from Amazon clawing back
8 Exhibits 9 and 10 from the investigational hearing of Neil Lindsay.

9 **OTHER DOCUMENTS**

10 6. Attached hereto as **Attachment A** is a true and correct copy of an email from Amazon
11 outside counsel Laura Kim to FTC attorney Jonathan Cohen dated February 21, 2023.

12 7. Attached hereto as **Attachment B** is a true and correct copy of the complete transcript of
13 the February 21, 2023 Meet and Confer between counsel for Amazon and counsel for the
14 FTC. Both the FTC and Amazon previously filed excerpts from this transcript. Dkt. #4-
15 1 at 197-205; Dkt. #51-6 at 2-6.

16
17 I declare under penalty of perjury that the foregoing is true and correct.

18
19
20 Executed on August 4, 2023.



Adam Rottner

Attachment A

Rottner, Adam

From: Kim, Laura <LKim@cov.com>
Sent: Tuesday, February 21, 2023 10:17 AM
To: Cohen, Jonathan
Cc: Graubert, John; Flahive Wu, Laura; Anthony, Stephen; Hall, John; Remick, Ali; Siegel, Andrew; Hoffman, Elena; Frech, Jacob; Cole, Margaret; Rottner, Adam; Nardini, Thomas; Jerjian, Olivia
Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

Confidential Treatment Requested

Thanks, Jonathan. We'll send you a Zoom link for our meeting today.

Laura

From: Cohen, Jonathan <jcohen2@ftc.gov>
Sent: Friday, February 17, 2023 2:31 PM
To: Kim, Laura <LKim@cov.com>
Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>; Hoffman, Elena <ehoffman@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Jerjian, Olivia <ojerjian@ftc.gov>
Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

EXTERNAL

Let's meet at Constitution Center, or virtually – your choice. As you know, we want to discuss your new privilege claims. Some particular questions include:

- What is the basis for your view that, pursuant to 16 C.F.R. 2.11(d)(1), we must return or destroy the materials at issue, rather than sequester them? (To provide you an assurance: to the best of our ability to ascertain this, no disputed materials are being used, and everything is either sequestered or being sequestered.)
- What is the difference, if any, between correspondence covering privilege-related issues coming from Ben and correspondence coming from you? Relatedly, who is responsible for Amazon's production within the meaning of 16 C.F.R. 2.11(a)(1), including the privilege claims in particular?
- Please explain your concerns about the Commission's handling of "categories" of documents that Amazon currently considers privileged. What are the categories? It's one thing if we see something that looks privileged. In a couple of instances, we've brought such documents to your attention. But it feels like Amazon wants us to conduct a privilege review on its behalf. In any event, if you want to ask us to be "on the lookout," so to speak, for things that slipped through your review and fall within "categories" (yet do not appear facially privileged), we need to know what categories you mean.

- What are the “additional facts” that Amazon learned that ostensibly “confirm” that certain documents you reference in your February 7 correspondence are, in fact, privileged? When did Amazon learn these facts and why? Do those additional confirmatory facts explain on only the clawbacks in Section I of that letter, or also those in Section II? And why did Amazon not investigate the potential for privilege further based on whatever prior suspicions of privilege it harbored yet only recently “confirm[ed]”? We don’t understand Amazon’s narrative as to how this happened.
- Amazon produced various significant documents to the FTC multiple times, with redactions, and following a supposedly painstaking – and certainly time-consuming – privilege review. We then conducted a substantial portion of our investigation (including numerous IHs) reasonably assuming that we could use what Amazon produced. We made strategic and practical decisions accordingly. To provide one small example, we would have questioned certain witnesses differently had you withheld this material initially. Now, after the previously-scheduled IHs have concluded, and both sides have done much work, Amazon has clawed things back. What remedy does Amazon propose?

Thanks,

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., CC-9528 Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

From: Kim, Laura <LKim@cov.com>

Sent: Wednesday, February 15, 2023 10:33 AM

To: Cohen, Jonathan <jcohen2@ftc.gov>

Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>; Hoffman, Elena <ehoffman@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Jerjian, Olivia <ojerjian@ftc.gov>

Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

Confidential

Dear Jonathan, We are available to meet with you on Tuesday, February 21 at 3:15 – either in person or by phone. Given that this meeting appears to be focused on issues and questions you plan to raise with Amazon, we do not see a need to have a court reporter present but we are not opposed to having one. To facilitate a productive meeting, please let us know in advance what issues you would like to discuss.

Please let us know once you can confirm the logistics for next week’s meeting.

Best,
Laura

From: Cohen, Jonathan <jcohen2@ftc.gov>
Sent: Monday, February 13, 2023 6:11 PM
To: Kim, Laura <LKim@cov.com>
Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>; Hoffman, Elena <ehoffman@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Jerjian, Olivia <ojerjian@ftc.gov>
Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

[EXTERNAL]

The below should be Tuesday, February 21.

Jonathan

From: Cohen, Jonathan <jcohen2@ftc.gov>
Sent: Monday, February 13, 2023 6:06 PM
To: Kim, Laura <LKim@cov.com>
Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>; Hoffman, Elena <ehoffman@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Jerjian, Olivia <ojerjian@ftc.gov>
Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

We want to discuss the issues and questions your new privilege assertions raise before we confer with you regarding other outstanding matters. We propose Tuesday, February 15, at 3:15 or 4:15.

Per our prior indications, we'll need to have a court reporter present. Alternatively, Amazon can agree that no agreements will be reached at the meeting and that Amazon won't attempt to characterize what transpired.

Thanks,

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., CC-9528 Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

From: Cohen, Jonathan
Sent: Wednesday, February 8, 2023 10:19 AM
To: Kim, Laura <LKim@cov.com>
Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>; Hoffman, Elena <ehoffman@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Jerjian, Olivia

<ojerjian@ftc.gov>

Subject: RE: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

In light of your correspondence later in the day yesterday, we're not in a position to respond.

We're reviewing that correspondence and we'll get back to you.

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., CC-9528 Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

From: Kim, Laura <LKim@cov.com>

Sent: Tuesday, February 7, 2023 11:03 AM

To: Cohen, Jonathan <jcohen2@ftc.gov>; Jerjian, Olivia <ojerjian@ftc.gov>; Nardini, Thomas <tnardini@ftc.gov>; Rottner, Adam <arottner@ftc.gov>; Cole, Margaret <mcole@ftc.gov>; Frech, Jacob <jfrech@ftc.gov>; Hoffman, Elena <ehoffman@ftc.gov>

Cc: Graubert, John <jgraubert@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Anthony, Stephen <santhony@cov.com>; Hall, John <jhall@cov.com>; Remick, Ali <ARemick@cov.com>; Siegel, Andrew <ASiegel@cov.com>

Subject: Confidential: Amazon.com, Inc., FTC Matter No. 2123050

Confidential Treatment Requested

Jonathan, Olivia, Max,

We would like to arrange a call this week to touch base about the investigation. Could you please let me know if you are available to speak on Wednesday between 10 and 11:30 or Thursday between 10 and 11? If one of those times works for your team, I can send a link, or please suggest some other times.

Best,
Laura

Laura Kim

Pronouns: She/Her/Hers

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5333 | lkim@cov.com
www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

Attachment B

In the Matter of:

Amazon.com, Inc.

February 21, 2023

Meet and Confer

Condensed Transcript with Word Index



For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Meet and Confer

Amazon.com, Inc.

2/21/2023

<p style="text-align: right;">5</p> <p>1 with respect to the first -- the first one. 2 So you indicate, and I'm paraphrasing, 3 that we shouldn't diverge from our customary 4 practice of returning or destroying inadvertently 5 disclosed material. So am I right that it's 6 Amazon's view that it's customary and may not 7 make sense to sequester, although we might 8 disagree about that, but it's customary to return 9 or destroy rather than sequester? You're not 10 saying we have no right to sequester, are you? 11 MS. KIM: Yeah. As I said in the 12 letter, it's been our understanding based on, you 13 know, multiple investigations with the FTC that 14 upon such a request, that staff does return or 15 destroy inadvertently disclosed materials, and 16 that's been my long-standing understanding. 17 In this case, it didn't make sense to 18 us, also because there's no pending action or 19 proceeding, and you also haven't -- you said, I 20 think, that there are -- that disputed materials 21 are either being sequestered or -- are either 22 sequestered or being sequestered, and it wasn't 23 clear to us whether that was the -- that you have 24 actually completed the sequestration for any 25 prior clawbacks.</p>	<p style="text-align: right;">7</p> <p>1 would be -- how could we really even obtain such 2 a review if we didn't sequester the materials. 3 It seems to me that under the rules, 4 we have a right to potentially seek judicial 5 review, and I don't know how we could really do 6 that if we destroyed them all. I'm not sure 7 there's an answer to that question. I don't know 8 if that's the reason why -- why sequestration is 9 appropriate. 10 In terms of what we doing, we've told 11 you that we are sequestering the materials, and 12 we're going to comply with both our obligations 13 under the rules, under the law, and under the 14 applicable legal -- legal ethics principles that 15 apply here as well. We're not going to say 16 anything further than that. 17 MS. KIM: Jonathan, can I ask before 18 you move on, as to the clawback request that 19 we've made previously, have you already 20 sequestered those materials? 21 MR. COHEN: Again, I'm not going -- 22 we've complied with the rules. We've complied 23 with our ethical obligation. I have to go back. 24 We may have even told you the status of some 25 things along the way. But we are -- we are not</p>
<p style="text-align: right;">6</p> <p>1 So our question was really whether the 2 Commission has in fact taken a sequestration 3 approach to all of the clawbacks, and we're 4 looking for confirmation that you have in fact 5 sequestered the documents, not just that you're 6 in the process of doing that. 7 MR. COHEN: So I'll address the issue 8 you raised in a moment. Let me go back to this, 9 which is that you're not contending that it's 10 inappropriate to sequester, even if you don't 11 think there's a point to the sequestration, 12 right? 13 MS. KIM: Yeah. I -- I don't believe 14 that sequestration makes sense in this instance, 15 and I didn't -- I was surprised that you said you 16 were sequestering the documents or planned to in 17 light of where we are procedurally. But really, 18 if you plan to sequester the documents, I would 19 simply like confirmation that that has actually 20 been done. 21 MR. COHEN: Okay. It's helpful. My 22 understanding is, again, you don't think it's a 23 good choice to sequester the documents. I mean, 24 I don't know that there will ever be any judicial 25 review of any of this. But I'm not sure how it</p>	<p style="text-align: right;">8</p> <p>1 going to do anything other than assure you that 2 we have complied with the rules, the law, and our 3 ethical obligations. 4 MS. KIM: I think it would be -- I 5 think it would be very helpful if you could 6 confirm that the materials are in fact being -- 7 you know, have in fact been sequestered, if that 8 is the approach you are taking. And if you're 9 confirming that now, that's helpful to know if 10 that's the approach you're taking with respect to 11 all of the clawbacks or not. 12 And it's been -- that's, I think, the 13 expectation is that Amazon would be at least 14 given information about how you are discharging 15 your obligations rather than just us assuming 16 that you are doing one of those two things, 17 either returning and -- or destroying or 18 sequestering. I just make that request again, if 19 you can please confirm that. 20 MR. COHEN: I think I've already 21 answered your question. I've already told you 22 I'm not providing further information. 23 What is the basis for your expectation 24 that that is something that we are obligated to 25 do or your understanding that's something we are</p>

2 (Pages 5 to 8)

Meet and Confer

Amazon.com, Inc.

2/21/2023

<p style="text-align: right;">9</p> <p>1 obligated to do at this point in time?</p> <p>2 MS. KIM: It's based on your</p> <p>3 professional responsibilities in terms of being</p> <p>4 informed that there was an inadvertent</p> <p>5 production. I think that's all we really need to</p> <p>6 say about that. That would be my expectation</p> <p>7 that you would confirm how you are discharging</p> <p>8 your obligations, and I'm just asking you to</p> <p>9 confirm what path you are actually taking under</p> <p>10 the regulations.</p> <p>11 MR. COHEN: We already told you,</p> <p>12 again, in an e-mail that we are in the process of</p> <p>13 sequestering materials and have sequestered</p> <p>14 materials. But if there's something that you</p> <p>15 think you're even entitled to that is greater</p> <p>16 than what we already told you, let me know what</p> <p>17 the basis is. And you can do it now, but you can</p> <p>18 also follow-up with a writing explaining what the</p> <p>19 basis is.</p> <p>20 I do -- we always want to comply with</p> <p>21 rules, laws, and our ethical duties. But -- and</p> <p>22 I may be ignorant potentially of some obligation</p> <p>23 that we have at the moment to provide you with</p> <p>24 additional information. If we have such an</p> <p>25 obligation, we will provide you with that</p>	<p style="text-align: right;">11</p> <p>1 are coming from the company directly. So I don't</p> <p>2 think that would be the same import as if it were</p> <p>3 on Covington letterhead. But it doesn't mean the</p> <p>4 fact -- it doesn't mean that Amazon isn't</p> <p>5 represented by both its in-house and outside</p> <p>6 counsel.</p> <p>7 MR. COHEN: Well, okay. So the</p> <p>8 difference in the import -- and I think maybe I</p> <p>9 didn't use the right language. The difference in</p> <p>10 the import is who is making the representation to</p> <p>11 the FTC. I don't mean representation in such a</p> <p>12 strong way, but who is making the statements to</p> <p>13 the FTC.</p> <p>14 So there's -- from your perspective,</p> <p>15 Ben is making the statements when Ben signs the</p> <p>16 letters. Covington is making the statements on</p> <p>17 Amazon's behalf when Covington signs the letter.</p> <p>18 MS. KIM: When I submit a letter to</p> <p>19 you on behalf of Amazon, yes, I'm submitting that</p> <p>20 on behalf of Amazon. I'm only writing to you in</p> <p>21 my capacity as outside counsel to Amazon. I'm</p> <p>22 actually -- I'm not sure where you're going with</p> <p>23 this. I mean, I'm just curious -- I'm curious</p> <p>24 why you're probing this actually.</p> <p>25 MR. COHEN: Well, I guess a couple of</p>
<p style="text-align: right;">10</p> <p>1 additional information.</p> <p>2 MS. KIM: Okay. Did you want to move</p> <p>3 on to the next topic?</p> <p>4 MR. COHEN: Yeah. The next topic is</p> <p>5 the 211A1, and I think this is something that's</p> <p>6 come up before. But nevertheless, it is clear to</p> <p>7 me from your answer that there is -- and it's</p> <p>8 clear to me from your answer that to -- this is</p> <p>9 the February 21st, 2023, correspondence, which is</p> <p>10 responding to our second question.</p> <p>11 It's clear to me from your answer that</p> <p>12 there's no difference between a communication</p> <p>13 that is on letterhead from Amazon, let's say</p> <p>14 signed by Ben, and a communication that's on</p> <p>15 letterhead from Covington on Amazon's behalf</p> <p>16 signed by -- signed by, let's say, you or one of</p> <p>17 your colleagues.</p> <p>18 MS. KIM: I think what I said in the</p> <p>19 letter is slightly different than that, Jonathan.</p> <p>20 MR. COHEN: Okay.</p> <p>21 MS. KIM: What we said is Amazon is</p> <p>22 represented by both in-house counsel and its</p> <p>23 outside counsel, Covington. Some of the letters</p> <p>24 that have been submitted on Amazon's letterhead</p> <p>25 have contained certain attestations, and those</p>	<p style="text-align: right;">12</p> <p>1 reasons. So one is that I don't -- I mean, I</p> <p>2 don't think we really have a problem with getting</p> <p>3 letters from Ben and some letters from Covington.</p> <p>4 It's not an issue. It's just curious because I</p> <p>5 have not noticed a pattern, and there may be a</p> <p>6 pattern that I just haven't detected as to why</p> <p>7 some letters come from Covington but some come</p> <p>8 from Ben.</p> <p>9 This also relates to two other</p> <p>10 questions. One of them has to do with the</p> <p>11 attestation requirement. I know that we</p> <p>12 disagree. Our position is that you need to tell</p> <p>13 us who the lead attorney is who is responsible</p> <p>14 for privilege claims, and your position is that</p> <p>15 the -- in fact you don't need to do that.</p> <p>16 Because the communications, or at</p> <p>17 least some of the communications that you have</p> <p>18 identified as containing the attestation -- I</p> <p>19 actually don't think they do contain it, but</p> <p>20 you've identified them as satisfying the 211A1</p> <p>21 requirement are coming from Ben.</p> <p>22 Are we to infer that Ben is the lead</p> <p>23 attorney that is responsible or ultimately</p> <p>24 responsible for the protected status claims?</p> <p>25 MS. KIM: Let me just back up for a</p>

3 (Pages 9 to 12)

Meet and Confer

Amazon.com, Inc.

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<p style="text-align: right;">13</p> <p>1 moment, Jonathan. You said that the letters do 2 not contain the attestation? 3 MR. COHEN: That's our position. 4 MS. KIM: Why is that? 5 MR. COHEN: Because the rule says -- 6 and maybe I misread the letters. But the rule 7 says its the lead attorney or attorney 8 responsible for supervising the review of the 9 material and who made the determination to assert 10 the claim. 11 You need to identify that person, and 12 possibly you have. That's why I'm asking whether 13 is that -- if you point us to a letter from Ben 14 that you say satisfies that obligation, are we to 15 infer that Ben is the lead attorney or attorney 16 responsible for supervising the review of the 17 material and who made the determination to assert 18 the claim? 19 MS. KIM: We've already told you 20 multiple times that we have provided the 21 attestation consistent with 211A1 in various 22 letters, and we cited them again in the letter 23 from today: October 7th, November 22nd, and 24 December 12th. And those were submitted by 25 Amazon with the appropriate attestation.</p>	<p style="text-align: right;">15</p> <p>1 MS. KIM: Correct. 2 MR. COHEN: That's Mr. Langner, okay. 3 Thank you. 4 Let's go to the number 3, and number 3 5 is one where actually -- by the way, clarifying 6 that it's Mr. Langner is very helpful to us. So 7 I appreciate that. 8 In terms of number 3, we disagree with 9 some of the characterizations, and you probably 10 would disagree with how we characterize some 11 things. But the -- I guess I have a couple of 12 questions. So let's set side the May 2021 13 meeting. 14 There's a paragraph kind of midway 15 down the page that says, for example, you've 16 mentioned privilege issues, raised privilege 17 issues concerning that meeting. But are there 18 other categories beyond the May 2021 meeting that 19 you feel we should -- and I'm using this term 20 loosely -- like be on guard? 21 I don't know what we would do. But, 22 Laura, you told me that like there's also this 23 meeting in August of 2018 and we feel that 24 meeting is privileged even though we didn't 25 always necessarily think that way and if you see</p>
<p style="text-align: right;">14</p> <p>1 I'm not -- again, I'm really confused 2 as to what remaining questions there really are 3 at this point. 4 MR. COHEN: Okay. Well, maybe I can 5 ask it a little bit more -- on a little different 6 way. 7 Who is the attorney responsible for 8 supervising the review of the material, and who 9 made the determination to assert the protected 10 status claims at issue? 11 MS. KIM: So just to be absolutely 12 clear, Ben Langner submitted the letters that 13 contain the attestation consistent with 211A1 14 which says the attestation shall be by the lead 15 attorney or attorney responsible for supervising 16 the review of the material who made the 17 determination to assert the claim. 18 MR. COHEN: Therefore, you want us to 19 take, and I am now taking, that the attorney 20 responsible within the meaning of 211A is Mr. 21 Langner? 22 MS. KIM: He's the lead attorney or 23 the attorney responsible for supervising the 24 review of the material and who made -- 25 MR. COHEN: And he made --</p>	<p style="text-align: right;">16</p> <p>1 anything, you should call. We would take that 2 under advisement. 3 What other than the May 2021 meeting 4 is -- is in the categories of things we should 5 kind of take under advisement as potentially 6 privileged? 7 MS. KIM: So I don't think I can relay 8 all of that just extemporaneously, Jonathan, 9 during this particular phone call. But the 10 letter itself gives you -- and this is not new 11 material. It gives you a number of different 12 factors that we think should help you make that 13 determination. 14 So the paragraph preceding that 15 paragraph you just cited provides you a number of 16 guidelines for you to consider. I'm not going to 17 be able to put that all together just, you 18 know -- like I said, extemporaneously. 19 MR. COHEN: Well, I don't fault you 20 for that. But can you follow-up with a list of 21 other categories? I mean, there's a difference, 22 I think, that is really important between 23 identifying categories that we should be on the 24 lookout for and identifying considerations. 25 So for instance, one of the</p>

4 (Pages 13 to 16)

Meet and Confer

Amazon.com, Inc.

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<p style="text-align: right;">17</p> <p>1 considerations you identify is privileged and 2 confidential. But privileged and confidential 3 appears on thousands of documents that Amazon has 4 produced, yet not clawed back. Attorneys are 5 copied on thousands of documents that Amazon has 6 produced but not clawed back. 7 So clearly, these considerations don't 8 require us to -- I mean, if you're telling us 9 that they are and that any document with 10 privileged and confidential on it we should 11 sequester, I mean, make that clear, and we'll 12 figure out how to do address that. I don't think 13 you mean that. 14 And so the reason that we're hoping 15 for categories, besides the fact that you -- you 16 use that approach in the initial letter, the 17 earlier letter, is that telling us to consider 18 things that would ordinarily be considered 19 doesn't -- is often not dispositive in this 20 instance. 21 MS. KIM: Well, Jonathan, the 22 paragraph also gives you other guidelines, and 23 these should not be a surprise. They, you know, 24 for example, include references to the documents' 25 legal purpose, communications that involve</p>	<p style="text-align: right;">19</p> <p>1 should not -- we shouldn't have assumed that 2 Amazon had made any judgment about its prior 3 assessment or was relying in any way on its prior 4 assessment of those same documents that it had 5 previously reviewed? It was sort of doing a 6 review -- a new review and reaching potentially 7 new conclusions? 8 MS. KIM: I'm not -- I'm not going 9 to -- I'm not going to get into the details of 10 what Amazon did or didn't do. Amazon made 11 appropriate privilege claims, and the question 12 now is whether you have repeatedly made attempts 13 to use documents from a different pending 14 investigation that were claimed privileged in our 15 investigation. That's -- those are the facts 16 here. 17 MR. COHEN: With respect to the May 18 2021 meeting, and I don't agree those are the 19 facts, but we'll move on to the May 2021 meeting. 20 May 2021 meeting you have -- we may 21 disagree about, you know, when the issues related 22 to the May 2021 meeting kind of arose, but 23 regardless, it's clear to us that Amazon is 24 asserting various claims with respect to that 25 meeting now.</p>
<p style="text-align: right;">18</p> <p>1 attorneys, individuals that, you know, are 2 attorneys based on our privilege logs, and the 3 required appendix. 4 So there's -- we're trying to be 5 responsive to what you raised in your e-mail, but 6 I think -- I think you know what your ethical 7 obligations are, and we have given you some 8 additional clues for how to help discharge that. 9 MR. COHEN: Okay. Just as to wrap 10 this up, to the extent there are other categories 11 beyond the May 2021 meeting that you want us to 12 be on the lookout for, will you send them to us? 13 MS. KIM: I will take that request 14 back to the client, but I'll also point out, in 15 the meantime, that you have repeatedly tried to 16 use documents produced in the competition 17 investigation which were withheld and known to be 18 privileged in our investigation. 19 So I'm not sure that I have to give 20 you the categories of documents when we have 21 already provided to you our privilege logs and 22 withheld materials appropriately in our matter. 23 MR. COHEN: Amazon didn't cross-check 24 the logs before producing it to us? For 25 instance, when you produced materials to us, we</p>	<p style="text-align: right;">20</p> <p>1 And the -- is it your view that it's 2 just the content of that meeting and what was 3 discussed and the memoranda that was discussed or 4 memorandum that was discussed at that meeting 5 that is privileged or just anything that's 6 connected to that meeting at all? 7 MS. KIM: It's not our position that 8 anything at all that's connected in any possible 9 way to that meeting is privileged. No, that's 10 not the position we're taking. I think our 11 letters make that clear, and our privilege logs 12 make that clear. 13 MR. COHEN: The mere fact that 14 something is somewhat connected to the May 2021 15 meeting or basically -- I'll go further than that 16 -- discloses information related to the May 2021 17 meeting or things that happened at the May 2021 18 meeting, if that's not information that is either 19 legal advice or was conveyed to obtain legal 20 advice, we need not be concerned about reviewing 21 such information? 22 MS. KIM: No. I wouldn't say that, 23 Jonathan. Here's my suggestion. My suggestion 24 is that if you have questions about particular 25 documents that implicate the May 2021 meeting,</p>

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<p style="text-align: right;">21</p> <p>1 you should feel free to raise those with us, and 2 in fact, before any of the IHs began in this 3 investigation, at least the ones where we were 4 representing the witnesses, we sought to have an 5 orderly process to do that. 6 Now at this point, you're going back 7 and asking questions about things that we could 8 have clarified in advance. I'm not going to 9 answer a question in -- like a hypothetical 10 question when there are actual documents that are 11 at issue in this matter and where you might be 12 questioning whether it was inadvertently 13 produced. And I'm happy to take those questions 14 from you and give you an informed answer after 15 reviewing the document. 16 I'm not going -- I can't sit here and 17 answer things hypothetically when we can actually 18 have an orderly process where you raise 19 particular documents and question them. I'm 20 happy to take those and respond to you. 21 MR. COHEN: We'll take that under 22 advisement. Obviously we're reluctant to tell 23 you which documents we think are particularly 24 interesting. But you know, if what you're saying 25 is that the way -- the situation we're in with</p>	<p style="text-align: right;">23</p> <p>1 subject of the discussion right now. 2 MR. COHEN: We're talking about the 3 May 2021 meeting. So I understand the procedure 4 that you would like is for if we have a question 5 as to whether a document is available for us to 6 use, we need to have a conversation with you 7 about it. Is that right? 8 MS. KIM: Yes, and in particular if it 9 implicates the sorts of issues that we layout in 10 some detail in our response to question number 3 11 of my letter from earlier today. 12 MR. COHEN: Okay. But that covers 13 almost everything that you have produced. I 14 think this is getting to what is troubling us. 15 So -- I mean, if I put these things together, 16 which you've said in response to number 3 and 17 what you're telling me now, then essentially any 18 time we want to make use of a document that 19 triggers some of these considerations, whether or 20 not it relates to the May 2021 meeting, you 21 believe the proper course of action is for us to 22 have a conversation with -- not rely on the fact 23 that you produced it to us after a painstaking 24 review, but instead have a conversation with you, 25 and we would move on a document by document basis</p>
<p style="text-align: right;">22</p> <p>1 respect to these privilege issues is the only way 2 we can get clarification is to just tell you 3 which documents we think are interesting to us -- 4 MS. KIM: No. 5 MR. COHEN: -- or important to us. 6 MS. KIM: That's not what I'm asking 7 you to do. I'm not asking you to choose any 8 document that you think is interesting and reveal 9 that to us. I'm not asking that, Jonathan. 10 MR. COHEN: All right. Well, you're 11 asking me to choose some document and discuss it 12 with you. 13 MS. KIM: You've asked about the May 14 2021 meeting, and you've asked whether documents 15 that relate to that meeting are necessarily 16 privileged or not. And what I'm saying is that 17 if you have particular questions about whether 18 there are documents that have been inadvertently 19 produced, I would welcome the opportunity to 20 review the document and provide you with more 21 information about that. That's what I'm saying. 22 I'm not asking you to share with me 23 what documents you find interesting. We all -- 24 we all know that we're talking about the May 2021 25 meeting. At least that's what I thought was the</p>	<p style="text-align: right;">24</p> <p>1 to determine which documents are available for 2 the Commission to consider in this investigation. 3 MS. KIM: Jonathan, I have laid out -- 4 I tried to resolve this in a productive manner by 5 giving you the guidelines that would help you 6 discharge your ethical obligation here to protect 7 Amazon's privilege, and I'm not -- I'm trying to 8 help us move forward productively on those 9 points. 10 If you want to -- if you have 11 particular questions about documents, I'm happy 12 to answer those and review the documents in 13 greater detail. But I don't know what -- what 14 more that I can say when there are some very 15 clear guidelines here that should put you on -- 16 you know, on alert about potential -- potentially 17 inadvertently produced documents. 18 MR. COHEN: All right. I have -- I'm 19 a little -- I'm still hazy on whether you intend 20 for us to rely on or to what extent you intend 21 for us to rely on the fact that a particular 22 document hasn't been clawed back. 23 What I hear you saying is the fact 24 that a particular document hasn't been clawed 25 back is not good enough if it has any of the</p>

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<p style="text-align: right;">25</p> <p>1 indications of privilege or potential privilege 2 that you have articulated on page 2, the third 3 paragraph down of your letter. 4 So for instance, if a document says 5 privileged and confidential on it, you haven't 6 clawed it back, we should have a conversation 7 with you to be sure that that document is 8 available for our consideration. 9 MS. KIM: I think the letter is clear 10 that we mention multiple different indicia, 11 indications of a document's privileged nature. 12 So I'm -- I would just invite you to review that 13 and follow-up with us if you have questions about 14 particular documents that based on your extensive 15 investigation, including 35-plus investigational 16 hearings, puts you on notice that it could be 17 inadvertently produced. 18 MR. COHEN: I guess what I'm 19 struggling with is there's a difference between 20 the -- I agree that if we are on notice that 21 something might be inadvertently produced, we may 22 have obligations. But the fact that even 23 multiples of the considerations on page 2 are 24 present doesn't seem to give us that indication 25 at least in this context. But we're going to</p>	<p style="text-align: right;">27</p> <p>1 Some of other things I think are maybe a little 2 bit more valuable in terms of reaching the 3 conclusion that you want us to be thinking about. 4 But hopefully you can appreciate why 5 it's problematic to tell us to look for 6 indications like privileged and confidential when 7 that indication is on so many documents, often in 8 conjunction with -- at least some other 9 theoretical or maybe minor indication that might 10 counsel in favor of the material being 11 privileged, coupled with many, many other 12 considerations pointing in the other direction, 13 including the fact that you produced it to us 14 after a painstaking review. But we are thinking 15 carefully about how to address this problem. 16 MS. KIM: Okay. So I see we just have 17 eight minutes left. I do want to reserve at 18 least a few minutes at the end for a couple of 19 things I wanted to cover with you. So if you 20 want to move on to another topic, that might be 21 helpful at this point. 22 MR. COHEN: Yeah. I do have some 23 things about the -- with respect to the privilege 24 log, and I can also stay a little bit longer. If 25 you can't, you can't -- that maybe we're not</p>
<p style="text-align: right;">26</p> <p>1 have to figure out what to do. Let me move on. 2 MS. KIM: Jonathan. 3 MR. COHEN: Yeah. 4 MS. KIM: I'm happy to move on. I do 5 want to just clarify your position. Is it your 6 position then that those -- those indications of 7 the privileged nature are -- are not helpful in 8 terms of determining whether something might have 9 been inadvertently produced? 10 MR. COHEN: No. That's not -- that's 11 not our position, with one exception. I'm not -- 12 well, I mean, I'm not sure that -- I need to 13 think about the use of the phrase privileged and 14 confidential in this context, whether that is 15 helpful and bears upon the analysis that we're 16 discussing. I certainly agree that some of the 17 other considerations are relevant to that 18 determination. 19 But again, we're faced with a 20 situation where many documents -- I don't mean a 21 dozen, but many documents that you have produced 22 but not yet clawed back have elements that are 23 present here as well. And I don't know the -- 24 you know, whether -- I mean that especially with 25 respect to the privileged and confidential stand.</p>	<p style="text-align: right;">28</p> <p>1 going to get to. I didn't know you were going to 2 raise other things, but I'll do the best that I 3 can. 4 I don't need to spend a lot of time on 5 number 4 because my interpretation is that you 6 will not provide us any information with respect 7 to the additional facts that were learned to 8 confirm or establish that these materials were 9 privileged. Maybe we can sort of skip past it 10 because am I right you're not going to provide us 11 any of that information? Not when it was 12 discovered, who discovered it, what it was, 13 something like that? 14 MS. KIM: Not at this point, but if 15 there are particular questions you have, I can 16 check with the client. 17 MR. COHEN: Well, I mean, it would be 18 worth it for you to go back to the client because 19 again -- and maybe this was not done on purpose. 20 I suspect -- well, I don't think it was done on 21 purpose. But this sort of late stage clawbacks 22 have put us in a tricky position, and it would be 23 helpful to know what exactly happened so that we 24 could understand why it was that this wasn't 25 ascertained earlier and what it was exactly that</p>

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<p style="text-align: right;">29</p> <p>1 was even ascertained in the first place.</p> <p>2 Likewise, with respect to 5, I took</p> <p>3 your position to be just that we haven't been</p> <p>4 prejudiced; therefore, there's no remedy for us</p> <p>5 from your perspective.</p> <p>6 MS. KIM: So starting with number 5, I</p> <p>7 don't -- I don't understand what the basis would</p> <p>8 be for a remedy at this point. So it really</p> <p>9 wasn't clear to me from the question as written</p> <p>10 in your e-mail, Jonathan, what the -- what you</p> <p>11 would have done differently or what should have</p> <p>12 happened. It was confusing, the questions. So</p> <p>13 we tried to answer your question the best that we</p> <p>14 could in our letter to try to move things</p> <p>15 forward.</p> <p>16 In terms of going back to number 4, we</p> <p>17 do -- we did produce to you a privilege log. I'm</p> <p>18 not able to share with you the particular, you</p> <p>19 know, what investigation I undertook in detail or</p> <p>20 share with you other privileged information,</p> <p>21 although you might want to know the answers to</p> <p>22 those questions. So no, that's -- that's not</p> <p>23 something that I could provide in greater detail.</p> <p>24 MR. COHEN: Okay. So we just need to</p> <p>25 take at face value that that's what happened?</p>	<p style="text-align: right;">31</p> <p>1 unusual for attorneys to develop a strategy based</p> <p>2 on the information they think is available to</p> <p>3 them. And if that information then materially</p> <p>4 changes, that would have affected what we -- we</p> <p>5 would have done.</p> <p>6 But I mean, there's -- we're obviously</p> <p>7 not before a judge, and I get all that. So</p> <p>8 there's probably not a lot further to really</p> <p>9 discuss because I don't hear you saying that</p> <p>10 you're going to be willing to make additional</p> <p>11 witnesses available for IHs or additional time on</p> <p>12 existing IHs to address some things differently</p> <p>13 than they were actually addressed at the time or</p> <p>14 some other remedy that might -- that might, you</p> <p>15 know, ameliorate the prejudice.</p> <p>16 MS. WU: Jonathan, this is Laura Wu,</p> <p>17 and I believe you've referenced the interchange</p> <p>18 we had in Lisa Leung's corporate IH. I agree I</p> <p>19 think we handled it the best way possible under</p> <p>20 the circumstances.</p> <p>21 As we laid out in our written</p> <p>22 correspondence, no remedy is necessary because</p> <p>23 there's no prejudice. You had the opportunity to</p> <p>24 fully question the witness as to non-privileged</p> <p>25 matters, and as you know, off the record, I let</p>
<p style="text-align: right;">30</p> <p>1 MS. KIM: In connection -- in</p> <p>2 conjunction with the privilege -- the privilege</p> <p>3 log that we provided to you as well.</p> <p>4 MR. COHEN: Well, specifically in</p> <p>5 conjunction to the late discovery of the</p> <p>6 privileged or allegedly protected status of these</p> <p>7 materials.</p> <p>8 MS. KIM: I mean, I've given you a</p> <p>9 letter that lays out our basis for making the</p> <p>10 claims. I'm not really sure what more I can give</p> <p>11 you. So yes, that's -- that's my work.</p> <p>12 MR. COHEN: I guess we disagree as to</p> <p>13 whether the letter actually lays out the basis</p> <p>14 for making the claims or explains why it is that</p> <p>15 the claims were made as late as they were.</p> <p>16 But just turning back to the number 5,</p> <p>17 I mean, some of these things are -- are fairly</p> <p>18 rudimentary. There was a clawback in the last IH</p> <p>19 and, you know, we -- there was a lot of back and</p> <p>20 forth with counsel. I think sort of in the</p> <p>21 moment everything was handled well by both sides.</p> <p>22 But nevertheless, you know, we --</p> <p>23 we're anticipating being able to question that</p> <p>24 witness about that particular document and then</p> <p>25 weren't able to do that. So I don't think it's</p>	<p style="text-align: right;">32</p> <p>1 you know that you had the ability to question the</p> <p>2 witness as to actual changes made to the</p> <p>3 enrollment flow, and you elected not to do that.</p> <p>4 I think one other point that's</p> <p>5 critical to underscore is there were about 10</p> <p>6 minutes left in the deposition when you</p> <p>7 identified this document. So I think those are</p> <p>8 all things that are relevant to consideration</p> <p>9 here. We want to be reasonable, but we don't</p> <p>10 believe any remedy is necessary given the</p> <p>11 clawback and the way it was handled, which is</p> <p>12 consistent with our ethical obligations and also</p> <p>13 the strategic decisions that you made, which are</p> <p>14 well within your decision-making power.</p> <p>15 If there's something specific you want</p> <p>16 to articulate, we could consider it, of course.</p> <p>17 We always want to be reasonable. But we're not</p> <p>18 in a position to offer a remedy that simply isn't</p> <p>19 necessary under the circumstances.</p> <p>20 MR. COHEN: All right. Well, I'm a</p> <p>21 little frustrated. I don't agree with your</p> <p>22 characterization, Laura Wu, of what took place in</p> <p>23 the hallway, and I'm a little frustrated by</p> <p>24 taking I think what I understood to be an</p> <p>25 off-the-record conversation intended to</p>

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<p style="text-align: right;">33</p> <p>1 facilitate sort of things moving forward in a 2 professional way and placing them on the record 3 here. So I'm not going to comment any further 4 about that.</p> <p>5 In terms of what actually happened on 6 the record, I think that it's normal for people 7 to plan examinations based on the documents they 8 think will be available to them and then finding 9 out at the last minute that that document might 10 not be available or isn't available affects the 11 approach or would have affected the approach had 12 that information been available earlier. But 13 that's okay. We'll leave it at that.</p> <p>14 I appreciate, Laura Wu, you saying 15 you'll consider some things that we might 16 propose, and we will get back to you with some 17 suggestions or we will endeavor to do that 18 anyway. I have to deal with some particular 19 things that may have arisen as a result of these 20 late clawbacks. We're going to give that some 21 consideration as well.</p> <p>22 But I am at least somewhat buoyed by 23 your indication that you're not absolutely 24 closing the door, and if there's something or 25 some things that we might be interested in,</p>	<p style="text-align: right;">35</p> <p>1 looking at some of the privilege issues, and you 2 may still be reviewing materials that Amazon's 3 produced and testimony that's been taken in the 4 matter. But we believe the investigation should 5 be closed and recognize you may not have come to 6 that conclusion yet because you might still be 7 reviewing materials.</p> <p>8 Nevertheless, before more time had 9 passed, I did want to relay to you that if you do 10 disagree with the notion that the case should be 11 closed and you do have questions or issues that 12 you are still considering, we would very much 13 like the chance to address those with you and to 14 meet with you to talk those through. So I wanted 15 to just make that clear and relay that to you.</p> <p>16 I know this is being transcribed, but 17 I will follow-up by e-mail just to let you know 18 that that's something the company would like to 19 request, the opportunity to engage with you on 20 those questions if you do have any. So just 21 wanted to let you know that.</p> <p>22 I don't know if you are in a position 23 to respond at this point but would welcome any 24 reactions you have.</p> <p>25 MR. COHEN: I'm not in a position to</p>
<p style="text-align: right;">34</p> <p>1 you're willing to at least listen, unless I'm 2 hearing that wrong.</p> <p>3 MS. WU: I think what I have said is 4 we are reasonable. We believe no remedy is 5 necessary and that it would be on staff to 6 propose something crisply so we can consider it. 7 We don't believe anything has been proposed to 8 this date. So we aren't in a position to address 9 a hypothetical.</p> <p>10 MR. COHEN: Okay. But you're not 11 ruling it out?</p> <p>12 MS. WU: We keep an open mind.</p> <p>13 MR. COHEN: Okay. Laura, because you 14 didn't indicate -- this is back to Laura Kim. 15 Because you didn't indicate anything you wanted 16 to talk about in today's meet and confer, we will 17 follow-up with -- because we're out of time or at 18 least in terms of -- I'm not sure we're 19 completely at the end of the privilege issues, 20 which are complex. But I'll do the best I can to 21 handle whatever you want to talk about now.</p> <p>22 MS. KIM: Yeah. I just wanted to take 23 this opportunity during today's call just to 24 touch base about process going forward. I 25 recognize that, just as you said, you're still</p>	<p style="text-align: right;">36</p> <p>1 respond. I'll leave it at that. I think we 2 still have some work to do. So I'll say that. 3 But nevertheless, I understand what the company 4 is requesting.</p> <p>5 MS. KIM: Okay. Appreciate you taking 6 that under advisement.</p> <p>7 MR. COHEN: Okay. All right. I think 8 there will be some further exchanges back and 9 forth on a bunch of things, so we'll get back to 10 you. Thanks. 11 (Whereupon, the proceedings concluded at 4:04 12 p.m.)</p> <p>13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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1 CERTIFICATE OF REPORTER

2 I, Tammy S. Newton, do hereby certify
3 that the foregoing proceedings were taken by me
4 in stenotype and thereafter reduced to
5 typewriting under my supervision; that I am
6 neither counsel for, related to, nor employed by
7 any of the parties to the action in which these
8 proceedings were taken; and further, that I am
9 not a relative or employee of any attorney or
10 counsel employed by the parties hereto, nor
11 financially or otherwise interested in the
12 outcome of the action.

13
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15 s/Tammy S. Newton
16 Tammy S. Newton
17 Notary Public
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